

REDETERMINATION ON REMAND

In the Matter of Certain Durum Wheat and Hard Red Spring Wheat from Canada:
Final Affirmative Countervailing Duty Determination,
Secretariat File No. USA-CDA-2003-1904-05
NAFTA Binational Panel Review

SUMMARY

In accordance with the NAFTA Panel's March 10, 2005, decision in *Certain Durum Wheat and Hard Red Spring Wheat from Canada*, Secretariat No. USA-CDA-2003-1904-05 (March 10, 2005) ("Decision of the Panel"), the Department of Commerce ("the Department") provides this redetermination on remand with regard to the Comprehensive Financial Risk Coverage Program. The Panel found that the Department erred in evaluating the borrowing guarantee, the lending guarantee and the initial payment guarantee as a single financial contribution, explaining that the plain meaning of the countervailing duty statute and regulations requires treating each component of the Comprehensive Financial Risk Coverage Program as a separate financial contribution. Therefore, the Panel remanded this issue back to the Department for action not inconsistent with such interpretation of the countervailing duty statute and regulations.

Comprehensive Financial Risk Coverage

The Department does not agree with the Panel's finding regarding the Comprehensive Financial Risk Coverage program. Nevertheless, as directed by the Panel, the Department has broken down the Comprehensive Financial Risk Coverage Program into three component parts – a borrowing guarantee, a lending guarantee, and an initial payment guarantee – and has treated each as a distinct financial contribution in this redetermination on remand.

Borrowing Guarantee

The Panel found that the borrowing guarantee should have been treated as a loan guarantee under sections 771(5)(D)(i) and 771(5)(E)(iii) of the Tariff Act of 1930, as amended (“the Act”) and 19 CFR 351.506(a) of the Regulations. See Decision of the Panel at 62.

Lending Guarantee

The Panel found that the lending guarantee should have been (or reasonably could have been) considered as a government export insurance scheme under 19 CFR 351.520(a) of the Regulations. Id.

Initial Payment Guarantee

The Panel found that the initial payment guarantee was a financial service that should have been treated as a provision of a service under sections 771(5)(D)(iii) and 771(5)(E)(iv) of the Act and 19 CFR 351.511(a) of the Regulations. Id.

Each of these components is discussed in detail below. As a consequence of the disaggregated approach to this redetermination that has been mandated by the Panel, the Department has recalculated the aggregate subsidy rate applicable to all producers and exporters of hard red spring wheat from Canada.¹

¹ As explained in the Decision of the Panel at pages 4-6, this “Chapter 19 proceeding is concerned only with...hard red spring wheat from Canada.”

ANALYSIS AND REDETERMINATION

I. Borrowing Guarantee

Until 1998, the Canadian Wheat Board (“CWB”) was an agent Crown Corporation of Canada, and CWB borrowings were guaranteed by virtue of this agency relationship. At the end of 1998, the CWB lost its agency status, and the Canadian Wheat Board Act was amended to its current form, which requires the CWB to submit an annual borrowing plan to the Minister of Finance, and seek approval of terms and conditions of the proposed borrowing. Section 19(5) of the Canadian Wheat Board Act provides that borrowings under an approved borrowing plan are guaranteed by the Government of Canada (“GOC”). During the period of investigation (“POI”),² all of the CWB’s borrowings were guaranteed by the GOC. See Preliminary Affirmative Countervailing Duty Determinations and Alignment of Final Countervailing Duty Determinations With Final Antidumping Duty Determinations: Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 FR 11374, 11379 (March 10, 2003) (“Preliminary Determination”).

The CWB borrows to finance its initial payments to farmers, operating expenses, and credit sales to sovereign and private buyers. During the POI, the CWB engaged in short-term borrowing by accessing the money markets in Canada and the United States and the global money market. The CWB also had outstanding borrowings using Euro Medium Term Notes (“EMTNs”). The CWB issued a variety of EMTNs in different currencies, having maturities ranging from 5 to 15 years. However, the CWB has swapped all of these EMTNs to U.S. dollar borrowings with floating interest rates and, based on how the swap agreements are structured,

² August 1, 2001, through July 31, 2002.

treats the swapped debt as essentially short term. See Preliminary Determination at 11379.

We determine that the GOC's guarantee of the CWB's borrowing is a countervailable subsidy. By guaranteeing the CWB's borrowing, the GOC is providing a financial contribution in the form of a loan guarantee, which is a potential direct transfer of funds or liabilities within the meaning of section 771(5)(D)(i) of the Act. This guarantee is limited to the CWB and, therefore, specific within the meaning of section 771(5A)(D)(iii)(I) of the Act. Finally, the guarantee confers a benefit to the CWB, pursuant to section 771(5)(E)(iii) of the Act, because there is a difference between what the CWB paid on its guaranteed loans and what it would have paid for comparable commercial financing in the absence of the guarantee, after adjusting for any difference in guarantee fees. See "Subsidies Valuation Information, Benchmark Interest Rates" section, infra, for further discussion of the benchmark rates used to make this determination.

To calculate the countervailable subsidy, we divided the total benefit received by the CWB during the POI by the CWB's total sales during the POI. On this basis, we determine the countervailable subsidy from the GOC's guarantee of the CWB's borrowings to be 1.14 percent *ad valorem*. See Memorandum to the File entitled "Final Calculation of Remand Subsidy Rate for the Canadian Wheat Board" (August 8, 2005), for the calculation of the borrowing guarantee subsidy rate.

Subsidies Valuation Information, Benchmark Interest Rates

The CWB had a large amount of short-term debt outstanding during the POI, all of which was guaranteed by the GOC. The CWB borrowed using five different instrument types: 1) commercial paper issued in the United States in U.S. dollars ("USCP program"); 2) notes issued in Canada in Canadian dollars ("WBN program"); 3) commercial paper issued in the

Euromarkets (*i.e.*, international markets) in U.S. dollars and certain other foreign currencies (“ECP program”); 4) Euro Medium Term Notes issued in U.S. dollars and Japanese yen (“EMTN program”); and 5) short-term lines of credit in U.S. and Canadian dollars. The CWB swapped its non-U.S. and non-Canadian dollar borrowings to U.S. dollar-denominated debt and, generally, its medium-term debt to short-term debt. See Preliminary Determination at 11376.

19 CFR 351.506(a) states that “{i}n the case of a loan guarantee, a benefit exists to the extent that the total amount a firm pays for the loan with the government-provided guarantee is less than the total amount the firm would pay for a comparable commercial loan that the firm could actually obtain on the market absent the government-provided guarantee,” and that the Department “will select a comparable commercial loan in accordance with 19 CFR 351.505(a) {of the Department’s regulations}.”

19 CFR 351.505(a)(2)(i) states that the Department normally will select a benchmark interest rate that is “comparable” in terms of the structure, maturity and currency of the firm’s loans. Accordingly, for the non-U.S. or non-Canadian dollar borrowings under the ECP and EMTN programs, we have used the U.S. dollar, short-term rates applicable under the swap agreements (rather than on the underlying loans) in determining whether a benefit exists.

19 CFR 351.505(a)(2)(ii) states that, in selecting a “commercial” loan, the Secretary normally will use a loan taken out by the firm from a commercial lending institution or a debt instrument issued by the firm in a commercial market. 19 CFR 351.505(a)(3)(i) states that in selecting a benchmark that reflects a commercial loan that the firm could actually obtain on the market, the Department “normally will rely on the actual experience of the firm in question in obtaining comparable commercial loans.” However, 19 CFR 351.505(a)(3)(ii) explains that “if

the firm did not take out any comparable commercial loans . . . {the Department} may use a national average interest rate for comparable commercial loans.”

Since *all* of the CWB’s borrowings are guaranteed by the GOC, no company-specific benchmark exists for “a comparable commercial loan that the firm could actually obtain on the market absent the government-provided guarantee.” See 19 CFR 351.506(a). Accordingly, consistent with our regulations, we reviewed the information on the record to determine an appropriate national average interest rate, both for U.S. dollar and Canadian dollar borrowings.

Based on our review of the record, we have identified short-term rates in Canada that could form the basis for a national average interest rate: the Canadian Prime rate,³ and the Canadian Bankers’ Acceptances rate.⁴ We have also identified short-term interest rates that could form the basis for a national average interest rate for U.S. dollar borrowings. These are the U.S. Prime rate,⁵ the U.S. LIBOR rate,⁶ the AA non-financial commercial paper rate, and the A2/P2 nonfinancial commercial paper rate.⁷

The Department’s regulations, 19 CFR 351.505(a)(1), state that in determining the existence and extent of any benefit from a government-provided loan, the Department will rely

³ January 13, 2003, “Questionnaire Responses of the GOC, Saskatchewan, and Alberta,” at Exhibit E-2.

⁴ January 13, 2003, “Questionnaire Responses of the GOC, Saskatchewan, and Alberta,” at Exhibit E-3.

⁵ U.S. Federal Reserve Web Site, <http://www.federalreserve.gov/releases/h15/data/m/prime.txt>.

⁶ January 13, 2003, “Questionnaire Responses of the GOC, Saskatchewan, and Alberta,” at Exhibit E-4.

⁷ U.S. Federal Reserve Web Site, <http://www.federalreserve.gov/releases/cp/histrates.txt>.

on effective interest rates.⁸ Therefore, we have included in our comparison the fees associated with the national average interest rate and the loans guaranteed by the Government of Canada.⁹

To compute the national average interest rate to use as the benchmark, we have calculated a simple average of the short-term interest rates listed above for the CWB's U.S. dollar borrowings, and its Canadian dollar borrowings. In addition, and consistent with the Preliminary Determination, we have used monthly average benchmark interest rates in our benefit calculations based on 19 CFR 351.505(a)(2)(iv).

II. Lending Guarantee

The CWB has two types of credit grain sales programs which are guaranteed by the GOC, the Credit Grain Sales Program ("CGSP") and the Agri-Food Credit Facility ("ACF"). The CGSP was established in 1952, and allows the CWB to sell grain on credit to customers who can provide a sovereign guarantee of repayment. Repayment terms under the CGSP cannot exceed 36 months. As of the beginning of the POI, the CWB had approximately C\$7.1 billion in outstanding credit under the CGSP. Approximately 84 percent of this total consisted of debt that had been rescheduled or was subject to rescheduling pursuant to Paris Club agreements,¹⁰ and an additional 12 percent represented overdue debt from the Government of Iraq. See Preliminary Determination at 11379.

⁸ 19 CFR 351.506(a)(1) links the loan guarantee methodology to the loan methodology in 19 CFR 351.505(a)(1).

⁹ April 14, 2003, "Third Supplemental Questionnaire Response of the Canadian Wheat Board," at 2.

¹⁰ The Paris Club is a forum where the GOC and other sovereign creditors have periodically agreed to extend repayment terms beyond original maturity dates and/or reduce the principal owed by a debtor country.

The ACF was established in 1995 to support sales of grain on credit to private sector customers. CWB lendings under the ACF are short-term, with repayment periods of one year or less. At the start of the POI, the CWB had approximately C\$85 million in outstanding credit under the ACF. All of the debts under this program are current. Id.

The CWB and the GOC both state that neither of these programs has been used to support sales to the United States, and that the United States is not on the GOC-approved list of countries to which export credits can be extended under the CGSP. In the CWB's January 13, 2003, "Response of the Canadian Wheat Board to the Department's Questionnaire," at page 45 the CWB explains that,

{n}either CGSP nor the ACF programs have been used on export sales to the United States. With regard to CGSP, the CWB is not permitted to extend credits under the CGSP unless the country involved has been specifically approved in advance by the GOC. The United States has never been approved by the GOC, and therefore the CWB could not extend credits under the CGSP to support exports to the United States, unless and until a specific GOC approval were obtained. Moreover, the intent of the CGSP program was to support western Canadian farmers in exporting to third country markets where they faced competition from U.S. and European grain sales guaranteed by their respective governments. Thus, the government's intent was not to support sales to the United States. Similarly, the ACF program was designed to compete with foreign-government supported credit. The extension of credit under the ACF program requires a transaction-by-transaction approval from the GOC. The CWB has never requested approval for a U.S. customer and thus has no legal authority to extend credit to a U.S. customer under ACF.

In addition, the CWB states that all of its credit customers, with the exception of Iraq, are paying the CWB according to the terms of their most recent lending agreements (original or restructured), and that the net cash flows to the CWB on restructured debt are the same both before and after the rescheduling. However, the CWB and GOC have stated that the GOC made

portions of the rescheduled payments for Poland, Ethiopia, Zambia, Egypt and Haiti. See Preliminary Determination at 11379.

The export guarantees provided under this program provide a financial contribution within the meaning of 771(5)(B)(i) and 771(5)(D)(i) of the Act. The Department will consider a subsidy to be an export subsidy if “eligibility for, approval of, or the amount of, a subsidy is contingent upon export performance...” 19 CFR 351.514(a). The GOC payments under this guarantee are contingent upon sales to the eligible foreign markets. Therefore, to the extent that a benefit is conferred as a result of this guarantee, we determine that this program is an export subsidy.

We further determine that any subsidies conferred by these lending guarantees are tied to the export markets that received the guarantees because the GOC must approve every country to which a lending guarantee will be provided. Consequently, in accordance with 19 CFR 351.525(b)(5)(i), any benefits would be attributed to export sales to those markets. Because approval for a lending guarantee for sales to the United States has never been requested, we find that the benefits under this program are tied to exports to other markets.

III. Initial Payment Guarantee

In July of each year, the CWB sets an initial payment level for the wheat it will receive from the farmers over the coming crop year (August - July). Since the 1990/91 crop year, the CWB has set the initial payment at approximately 75 percent of the expected price for the crop year. The farmers receive this initial payment when they deliver their wheat for sale by the CWB. Over the course of the crop year, the initial payment can be revised upward. See Memorandum to Joseph A. Spetrini entitled “Preliminary Determination for the Initial Payment

Guarantee Program” (May 5, 2003) at 2 (“Initial Payment Preliminary Determination”).

When the CWB earns more revenue from its sales than it has spent for the initial payments and other operating expenses, the residual is distributed to the farmers. However, in the event of a shortfall, *i.e.*, revenues are less than the initial payments plus operating expenses, section 7(3) of the Canadian Wheat Board Act obligates the GOC to cover the deficit. Up to and including the POI, the GOC has, over the course of the CWB’s history, made payments under this guarantee seven times. The last time was during the 1990/91 marketing year. See Initial Payment Preliminary Determination at 2.

We determine that the GOC’s guarantee of the CWB’s initial payment is a countervailable subsidy. In accordance with the Panel’s findings, we determine that the financial contribution is the provision of a service within the meaning of section 771(5)(D)(iii) of the Act. Further, as explained below, the GOC is providing this service for less than adequate remuneration within the meaning of section 771(5)(E)(iv) of the Act. Finally, this guarantee is limited to the CWB and, therefore, specific within the meaning of section 771(5A)(D)(iii)(I) of the Act.

The service that is being provided in this instance is a type of insurance. By virtue of its commitment to cover any shortfall between the CWB’s revenues for wheat and the CWB’s costs of obtaining and selling the wheat, the GOC is essentially providing insurance which insures that the CWB will break even.

We are not aware of commercially available insurance policies of this form, *i.e.*, policies that will make a company whole when the company incurs a loss, nor have the parties pointed to any such policies. Instead, the parties have debated using options prices for wheat on the

Minneapolis Grain Exchange (“MGE”) or constructing options values under different models.

Based on our review of the parties’ comments, we have determined that the GOC’s initial payment guarantee does not lend itself to being valued as a put option purchased on the MGE. With such an option, the purchaser of the option (the CWB) is buying the right to sell its product (wheat) at a given “strike” price (the initial price paid to the farmer) within a certain period of time. Thus, if the market price for wheat fell below the strike price before the option expired, the CWB could exercise its option and sell its wheat for the higher strike price. The GOC’s initial payment guarantee is not, however, protecting the CWB against a low market price for wheat on a particular day. Instead, the GOC is insuring that the CWB will break even, even if the average revenue it earns on its sales over the course of a year is less than its initial payments and operating expenses. Thus, a put option offered on the MGE does not mirror the service being provided by the GOC.

Having determined that an MGE put option for wheat would not appropriately measure the value of the initial payment guarantee, we note that no other market-determined benchmarks have been put forward by the parties. Moreover, the Department is not aware of commercially available policies that insure against this type of event. Therefore, we determine that there is no benchmark for adequate remuneration under 19 CFR 351.511(a)(2)(i) or (ii). Instead, we have developed a benchmark in accordance with 19 CFR 351.511(a)(2)(iii).

Under this provision of our regulations, we measure the adequacy of remuneration by “assessing whether the government price is consistent with market principles.” As noted above, among the valuation methods discussed by the parties were various options models. The

petitioners¹¹ put forward the Black-Scholes model. The respondents¹² put forward the Asian options model. Both models generate a price or premium for the option.

For this redetermination on remand, we have employed the Asian or average price option model. This model provides the best representation of the guarantee being offered by the GOC because it incorporates the average price of wheat over the life of the option. Specifically, this type of option provides the purchaser of the option with a guarantee of earning a specified price for wheat (the strike price) when the average price of wheat over the period of the option falls below the strike price.

Using the Asian option model, we have constructed an average price put option purchased on the first day of the crop year, August 1, 2001, with a maturity of one year. This yields the premium that would be paid for an option that mimics the GOC's initial price guarantee. Record information also indicates that commissions and fees are typically charged on the purchase of an option and we have included these commissions and fees in our calculation. See "Initial Payment Guarantee Questions of the Second Supplemental Questionnaire Response of the Canadian Wheat Board" (February 26, 2003), at Exhibit 6.

To utilize the model, we need to specify certain variables. These are described below.

Strike Price

For the strike price, we have used the break even price reported by the CWB for August

¹¹ North Dakota Wheat Commission (hard red spring wheat), United States Durum Growers Association (durum wheat), and the Durum Growers Trade Action Committee (durum wheat) (collectively, the "petitioners").

¹² The CWB, the GOC, the Government of Saskatchewan ("GOS"), and the Government of Alberta ("GOA").

2001. See CWB Verification Exhibit 10 (June 9, 2003). See also Memorandum to the File entitled “Calculation of Remand Subsidy Rate for the Canadian Wheat Board” (August 1, 2005), for the calculation of the strike price. See also Comment 2 below.

Asset Price

For the asset price, we are using the MGE low closing cash price for 14 percent Dark Northern Spring wheat on July 31, 2001. See CWB Reply Brief (June 30, 2003), at Exhibit 2. This is the closest actual price of wheat observable in the market before a put option would be purchased on August 1, 2001. See Memorandum to the File entitled “Final Calculation of Remand Subsidy Rate for the Canadian Wheat Board” (August 8, 2005), for the calculation of the asset price. See also Comment 2 below.

Volatility

We have calculated volatility using the MGE low closing cash price for 14 percent Dark Northern Spring. We have chosen the MGE to measure price volatility because the CWB relies heavily on MGE prices in setting its own prices.¹³ We have measured the volatility of the MGE

¹³ The CWB’s reliance on the MGE for setting prices was discussed extensively in the companion antidumping duty investigations of hard red spring and durum wheat from Canada. The following information was taken from the Particular Market Situation memorandum (public version) from Susan Kuhbach to Jeffrey A. May, dated May 1, 2003:

According to the CWB, the evidence indicates that the CWB’s prices are based on reference product prices at reference locations (*e.g.*, Vancouver, Thunder Bay), which are typically derived relative to the MGE or, for durum, a combination of available MGE price information and various other market sources. *See* March 4 Supplemental Questionnaire Response, at 2. The CWB states that, in addition to the CWB’s assessment of current market prices and market trends derived from published reports, CWB staff also consider daily market information obtained from potential and existing Canadian, U.S., and other customers. *See* February 21 Supplemental Questionnaire Response, at A-38. The CWB sometimes relies on these other market sources for permutations of wheat products not quoted on the MGE (*i.e.*, different product codes based on grade, class, and protein content), but reliance on various other market sources

prices in the year preceding the 2001 crop year, because this volatility would be known on August 1, 2001, the time when the option was purchased. See Memorandum to the File entitled “Calculation of Remand Subsidy Rate for the Canadian Wheat Board” (August 1, 2005), for the calculation of the volatility.

Benefit

Using the Asian model, we have calculated the per bushel price of an average price option. This is multiplied by the number of hard red spring wheat bushels sold in the POI, and divided by total CWB hard red spring wheat sales to result in the subsidy rate.

The resulting countervailing duty rate is 1.05 percent *ad valorem* for the initial payment guarantee. See Memorandum to the File entitled “Calculation of Remand Subsidy Rate for the Canadian Wheat Board” (August 1, 2005), for the calculation of the initial payment guarantee subsidy rate.

is especially important for durum wheat because the MGE does not consistently quote prices for durum wheat. *See* March 4 Supplemental Questionnaire Response, at 14.

* * *

Furthermore, in the Supplemental Questionnaire Response, the CWB provided several charts and graphs to demonstrate: (1) the direct relationship between the published CWB closing price and that posted on the MGE for the three top-selling product codes in both the durum wheat and hard red spring wheat product lines, in terms of quantity of domestic sales (February 21 Supplemental Questionnaire Response, at Appendices A-46 and A-47 and March 4 Supplemental Questionnaire Response at 12-15); (2) that the base prices utilized by the CWB were within the daily range of prices published by the MGE or other sources (February 21 Supplemental Questionnaire Response, at A-41 to A-42); and (3) that differences between the CWB’s prices and U.S. market prices are caused by differences in freight expenses. The CWB explained that, for any given sale, the reference price is adjusted, in part, to account for differences in freight costs between the reference location and contract location (February 21 Supplemental Questionnaire Response, at A-42 and Appendix A-47; March 4 Supplemental Questionnaire Response, at 2).

COMMENTS

Comment 1: Borrowing Guarantee

CWB's Argument: The CWB argues that the national average interest rate that the Department has calculated is not “comparable” within the meaning of the statute or the Department’s regulations, and does not accurately reflect the CWB’s borrowing costs in the absence of the guarantee. The CWB cites to record evidence that it claims demonstrates what the CWB’s borrowing costs would be in the absence of the guarantee. The CWB maintains that it would continue to have a strong credit rating in the absence of the borrowing guarantee, and would not pay anywhere near the interest rates that the Department has calculated as a national average that is not based on specific credit ratings. The CWB contends that the Department should apply the verified evidence on the record concerning the CWB’s credit rating and borrowing costs in the absence of the borrowing guarantee.

The CWB also argues that the Department’s calculation of the national average interest rate benchmark contains an error. In the calculation of the benchmark rate for U.S. dollar denominated borrowings of 180 days or longer, the Department averaged two rates, the U.S. prime and U.S. LIBOR for 180-day maturities. The Department did not include in its average the AA and A2/P2 commercial paper rates from the Federal Reserve because there were no reported rates for 180-day maturities. The CWB alleges that this skews the 180-day rates by at least 50 basis points on average. The CWB recommends two solutions. First, the CWB argues that the Department could apply the 90-day rate to all issuances with a maturity of 90 days or more. The CWB notes that the Department did this for the Canadian dollar denominated borrowing because the Department did not have 180-day rates. Second, the CWB notes that the Department could

average together the available 90-day AA and A2/P2 rates with the 180-day rates available for U.S. prime and U.S. LIBOR, in order to arrive at an average 180-day rate that includes a commercial paper component. The CWB concludes that the national average interest rate for 30-, 90-, and 180-day maturities must include a commercial paper component in order to be comparable to the CWB's commercial paper borrowing.

Petitioners' Argument: Petitioners argue that the Department failed to include the benefit associated with the line of credit borrowing to the benefits associated with the USCP, ECP, WBN, and EMTN borrowing programs. Petitioners request that the Department correct this error for the final redetermination on remand.

In response to the CWB's comments, the petitioners argue that the credit rating information for the CWB that is on the record has been disputed by the petitioners since it was submitted, and the petitioners do not believe that the verification process did anything to dispel the petitioners' concerns. Petitioners also note that the CWB's credit rating rose and fell according to the GOC's credit rating. Petitioners argue that this shows that the CWB is not creditworthy enough to stand on its own absent the GOC guarantee.

Regarding the benchmark rate calculated for the CWB's U.S. dollar-denominated borrowings of 180 days or more, petitioners argue that the Department's calculation was correct because the 180-day U.S. LIBOR rate is a reasonable proxy for the 180-day commercial paper rate. In support of their position, the petitioners compare the 180-day U.S. LIBOR rate to the 90-day AA and 90-day A2/P2 commercial paper rates. On this basis, the petitioners argue that the Department should not make any of the changes recommended by the CWB.

Department's Position: 19 CFR 351.505(a)(1) states that "a benefit exists to the extent that the

amount a firm pays on the government-provided loan is less than the amount the firm would pay on a comparable commercial loan(s) that the firm could actually obtain on the market.” In determining what loans a “firm could actually obtain on the market,” the Department normally looks to the firm’s *actual* borrowing experience in commercial markets. See 19 CFR 351.505(a)(3)(i). All of the CWB’s existing commercial borrowings are covered by the borrowing guarantee and, therefore, there are no actual CWB borrowings that can serve as a basis for an interest rate benchmark. Consequently, in accordance with 19 CFR 351.505(a)(3)(ii), the Department is using, “a national average interest rate for comparable commercial loans.” In this case, because the CWB’s borrowings are short-term and denominated in either Canadian dollars or U.S. dollars, we have calculated a short-term benchmark for Canadian dollar borrowings and a short-term benchmark for U.S. dollar borrowings. See 19 CFR 351.505(a)(2).

The benchmarks calculated for this redetermination on remand are different from those used in the draft redetermination on remand. Instead of calculating different benchmarks for different short-term maturities, *e.g.*, a 30-day benchmark for 30-day borrowings by the CWB, we have calculated a single short-term benchmark rate for Canadian dollar borrowings, and another for U.S. dollar borrowings. These revised benchmarks better comport with the requirements of 19 CFR 351.505(a)(2)(iv) and the definition of “comparable” in 19 CFR 351.505(a)(2)(i). This definition makes a distinction between short- and long-term loans, but does not distinguish between different short-term maturities.¹⁴ As a result of this change, the arguments made by the parties about adjustments to the rates for different maturities are moot.

¹⁴ 19 CFR 351.102(b) defines a “short term loan” as one for which the terms of repayment are one year or less.

Regarding the CWB's claims about evidence of its credit rating and borrowing costs in the absence of the borrowing guarantee, we note that the information does not pertain to actual borrowings of the CWB and, hence, does not provide a benchmark under 19 CFR 351.505(a)(3)(i). Absent such a benchmark, the Department applies a national average interest rate, in accordance with 19 CFR 351.505(a)(3)(ii), as we have done.

Finally, we agree with the petitioners that we inadvertently did not add the benefit associated with the line of credit borrowing to the total benefit of the borrowing guarantee. We have corrected this error.

Comment 2: Initial Payment Guarantee

CWB's Argument: First, the CWB argues that the Department made an error by including a per-bushel operating cost in the strike price, since the Department acknowledged that the strike price it used already included operating costs.

Second, the CWB argues that the Department chose the incorrect strike price. The CWB argues that the breakeven price it provided, and that the Department used as the strike price, is for all classes, grades, and protein levels of wheat. Therefore, it does not reflect the correct strike price for 2 Canadian Western Red Spring wheat 13.5 percent protein ("2 CWRS 13.5") which the Department was attempting to value. The CWB contends that the Department should instead use 75 percent of the August 2001 Pool Return Outlook ("PRO") for 2 CWRS 13.5. The CWB explains that the initial payment that became effective August 1, 2001, was set in July 2001 at 75 percent of the PRO.

In response to the petitioners' comments, the CWB argues that the asset price used must correspond to the commodity for which the Asian option value is sought, or there will be a

mismatch of terms. Because the Department chose to calculate the option using 2 CWRS 13.5, it must use the price of 2 CWRS 13.5 (or its equivalent) as the asset value. The Department has confirmed, argues the CWB, that 14 percent DNS is equivalent to 2 CWRS 13.5, so the price for 14 percent DNS is the appropriate asset price.

The CWB argues that it makes little difference which particular class, grade and protein level of wheat the Department chooses to value in its Asian option calculation, as long as the asset price and strike price are both based on a specific commodity. The CWB argues that there is no reason to believe that the per-bushel value of an Asian option, correctly valued, will differ significantly across classes, grades, and protein levels of hard red spring wheat because the ratio between the asset price and the initial payment price is basically constant and because the other variables in the calculation do not change.

Petitioners' Argument: In response to the CWB's comments, the petitioners argue that the Department clearly meant to add the operating cost into the strike price and that it would be correct to do so.

The petitioners also contend that the Department was correct to use the breakeven price as the strike price in the Asian option model because this allows the Department to value the guarantee with respect to the entire wheat pool as opposed to a particular class, grade, and protein level of Canadian hard red spring wheat. In this way, the Department does not have to calculate the value for one specific type of wheat, and then make the assumption that the subsidy rate for all other wheat is the same.

The petitioners argue further that the Department should use the price of 13 percent DNS as the asset price. The petitioners claim that the Department's use of 14 percent DNS for the

asset price presupposes that the average grade of wheat in the CWB wheat pool is equivalent to 14 percent DNS. However, the petitioners contend that the PRO shows that the CWB also purchases and sells wheat with a protein content of less than 14 percent. To capture the CWB's purchases and sales of wheat with a protein content of less than 14 percent, petitioners recommend using the price of 13 percent DNS, which is publicly available for the POI from the Minneapolis Daily Cash Grain Report.

The petitioners make this argument because the Department has used the breakeven price for the entire wheat pool as the strike price. Therefore, the petitioners argue that the asset price should also be reflective of the entire wheat pool instead of one specific type of wheat. The petitioners contend that the CWB sells wheat of various qualities, and that 13 percent DNS would be a more appropriate valuation of the average type of wheat sold by the CWB.

Department's Position: Based on our review of the record, the break even price represents the price the CWB needs to receive in order to avoid a deficit in the pool. See "Initial Payment Guarantee Questions of the Second Supplemental Questionnaire Response of the Canadian Wheat Board," (February 26, 2003) at 4. Since operating expenses are assigned to each pool, see "Public Version of the CWB's 2001-2002 Crop year Annual Report," (May 2, 2003) at 57, it is reasonable to treat the break even price as inclusive of operating expenses.

We also agree with petitioners and respondents that, in theory, the strike price and asset price should be stated on the same basis. For the reasons explained below, however, neither of the approaches advocated by the interested parties is acceptable and we have, therefore, retained the approach from our draft remand redetermination.

First, it is appropriate to base the strike price on the entire wheat pool. The driving factor

is that the GOC is guaranteeing that the CWB will break even on all of the wheat included in the pool, not just a single wheat type. Although the CWB has argued that any single type of wheat can serve as a proxy for the entire pool, there is no support for this claim on the record.

Moreover, it would be inappropriate to use the price that the CWB suggests, because it is a price set by the CWB and, thus, cannot be assumed to be reflective of market prices. Therefore, we have continued to use the August 2001 break even price as the strike price.

Second, we do not have the information on the record necessary to state the asset price on a pool-wide basis. We do not agree with the petitioners' suggestion that 13 percent DNS would be representative of the CWB's entire wheat pool. While the petitioners may be correct that some lower grade wheat is sold by the CWB, it appears that there is also higher grade wheat, thus, there is no basis to say that 13 percent DNS is representative of the wheat pool.

While we acknowledge that it would be desirable to state the asset and strike price on the same basis, the record does not contain information that would allow us to construct a pool-wide asset price. Accordingly, we are continuing to use the asset price we used in the draft remand redetermination as the most reasonable calculation based on the record evidence.

Comment 3: Lending Guarantee

Petitioners' Argument: The petitioners contend that the lending guarantee confers a benefit on the CWB and would like the Department to reconsider its decision. The petitioners argue that the lending guarantee, "while designed to promote exports of hard red spring wheat, had been converted into a cash and income generating financing system which clearly benefits the overall operations of the CWB irrespective of sales to any particular market." Petitioners continue by arguing that it "is the interest income stream generated as a result of the lending guarantee that

directly (or at the very least, indirectly) provides a subsidy on the production and export of Canadian hard red spring wheat for the United States. And, it is this aspect of the lending guarantee which is countervailable under Section 771(5)(C) of the Tariff Act of 1930.”

The petitioners conclude by arguing that, even under the NAFTA panel’s analysis, a benefit exists if the premium rates charged under the lending guarantee program are inadequate to cover the long-term operating costs and losses of the program. The petitioners contend that this is exactly the case here and, thus, the NAFTA panel approach also yields a countervailable benefit.

Governments’ Argument: The GOC, GOS, and GOA argue that the Panel properly confirmed that the export credit (lending) guarantee is tied to non-U.S. markets and, thus, does not provide a countervailable subsidy on exports to the United States.

Department’s Position: Under 19 CFR 351.514(a), “{t}he Secretary will consider a subsidy to be an export subsidy if the Secretary determines that eligibility for, approval of, or the amount of, a subsidy is contingent upon export performance.” As the guarantee is only available for export sales, eligibility for the subsidy is contingent upon export performance. Hence, the lending guarantee is an export subsidy. 19 CFR 351.525(b)(4) states that “{i}f a subsidy is tied to a particular market, the Secretary will attribute that subsidy only to products sold by the firm to that market.” As the lending guarantee is approved on loans only for particular non-U.S. export markets, the benefits of the guarantee are attributable only to those markets.

REDETERMINATION ON REMAND

In accordance with the Panel's instructions on remand, we have de-constructed the Comprehensive Financial Risk Coverage program into separate financial contributions and determined the benefit from each financial contribution separately. As a result, we have recalculated the *ad valorem* subsidy rate for hard red spring wheat from Canada for the period August 1, 2001, through July 31, 2002. The revised rate is 2.54 percent *ad valorem*. This rate includes the 0.35 percent *ad valorem* rate for the provision of government-owned and government-leased railcars, the inclusion of which was upheld by the NAFTA panel.

Barbara E. Tillman
Acting Assistant Secretary
for Import Administration

Date